

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs January 13, 2009

GEORGE S. HUTTON v. STATE OF TENNESSEE

Appeal from the Circuit Court for Lawrence County
No. 27217 Robert L. Holloway, Jr., Judge

No. M2008-01702-CCA-R3-PC - Filed May 6, 2009

Petitioner, George S. Hutton, pled guilty to theft of property and altering, falsifying or forging automobile title/assignment/plates in January of 2002 and was sentenced to a total effective sentence of six years. On June 24, 2008, Petitioner filed a petition for post-conviction relief. The post-conviction court dismissed the petition as untimely. Petitioner has appealed, arguing that his petition was timely because the new rule of law announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), was not recognized by Tennessee courts until *State v. Gomez*, 239 S.W.3d 733 (Tenn. 2007) ("*GomezII*"). We determine that the post-conviction court properly dismissed the petition as untimely. Accordingly, the judgment of the post-conviction court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

George S. Hutton, Pro Se, Whiteville, Tennessee.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; and Mike Bottoms, District Attorney General, for the appellee, State of Tennessee.

OPINION

On June 24, 2008, Petitioner filed a petition for post-conviction relief in which he alleged that he was sentenced to the maximum sentence in the range after his guilty pleas to theft of property and altering, falsifying or forging automobile title/assignment/plates in January of 2002.¹ Petitioner claimed that his sentences violated the Sixth Amendment as interpreted by the courts in *Apprendi*,

¹The facts supporting the underlying guilty pleas are not apparent from the record. The record does not contain the transcript from the guilty plea hearing or the judgment forms for Petitioner's convictions.

and its progeny. Further, Petitioner argued that his guilty pleas were entered unintelligently because he was not advised of *Apprendi* prior to pleading guilty.

It does not appear from the record that Petitioner sought a direct appeal from his convictions or sentence.

The post-conviction court dismissed the petition for post-conviction relief as untimely. Petitioner filed a timely notice of appeal. On appeal, he argues that his petition for post-conviction relief is not untimely because it meets one of the narrow exceptions under which an untimely petition may be considered. Further, Appellant argues that the petition is not untimely because the new constitutional law announced in *Blakely v. Washington*, 542 U.S. 296 (2004), interpreting *Apprendi*, was not recognized by the Tennessee Supreme Court until October 9, 2007, in *Gomez II*. The State contends that the petition was properly dismissed by the post-conviction court.

Analysis *Post-conviction Standard of Review*

The post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). During our review of the issues raised, we will afford those findings of fact the weight of a jury verdict, and this Court is bound by the post-conviction court's findings unless the evidence in the record preponderates against those findings. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not reweigh or reevaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. *See State v. Honeycutt*, 54 S.W.3d 762, 766-67 (Tenn. 2001). However, the post-conviction court's conclusions of law are reviewed under a purely de novo standard with no presumption of correctness. *See Fields v. State*, 40 S.W.3d 450, 457 (Tenn. 2001).

Petitioner's post-conviction petition is clearly barred by the statute of limitations. Tennessee Code Annotated Section 40-30-102(a) provides that a petition for post-conviction relief must be filed within one year of final judgment. Petitioner filed the instant petition nearly six years after the judgments in his case became final. The Post-Conviction Procedure Act enumerates few exceptions to this one-year time limit. *See T.C.A. § 40-30-102(b)*. In order to qualify, the claim in the petition must be based upon a new rule of constitutional law requiring retrospective application, must be based upon new scientific evidence establishing actual innocence, or must assert relief from sentences which were enhanced because of a previous conviction that has subsequently been found to be illegal. *Id.* Petitioner claims that his petition is not time-barred because the rule of law announced in *Apprendi* was not confirmed until *Gomez II* recognized the holdings in *Apprendi* and *Blakely* on October 9, 2007.

We must reject Petitioner's argument with regard to excusing his untimely filing. Our courts have repeatedly held that *Blakely*, *Cunningham v. California*, 549 U.S. 270 (2007), and *Gomez II* did not establish a new rule of constitutional law which was entitled to retroactive application on

collateral review as it was only a clarification of the rule announced in *Apprendi*. *Ira Ishamael Muhammad v. State*, No. E2007-00748-CCA-R3-PC, 2009 WL 400633, at *5 (Tenn. Crim. App., at Knoxville, Feb. 18, 2009); *Ortega Wiltz v. State*, No. M2006-02740-CCA-R3-CD, 2008 WL 1850796, at *9 (Tenn. Crim. App., at Nashville, Apr. 25, 2008), *perm. app. denied*, (Tenn. Oct. 27, 2008); *Timothy R. Bowles v. State*, No. M2006-01685-CCA-R3-HC, 2007 WL 1266594, at *3 (Tenn. Crim. App., at Nashville, May 1, 2007). Consequently, Petitioner did not file the petition for post-conviction review prior to the expiration of the statute of limitations. The post-conviction court properly dismissed the petition for post-conviction relief.

Conclusion

For the foregoing reasons, the judgment of the post-conviction court is affirmed.

JERRY L. SMITH, JUDGE